

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE J.B.KOSHY
&
THE HONOURABLE MR. JUSTICE T.R.RAMACHANDRAN NAIR

TUESDAY, THE 30TH JANUARY 2007 / 10TH MAGHA 1928

CRL.A.No. 147 of 2004(C)

SC.420/2001 of ADDL. SESSIONS COURT, FAST TRACK NO.I., PALAKKAD
CP.36/2000 of JUDL.MAGISTRATE OF FIRST CLASS COURT,
MANNARKAD
.....

APPELLANT/ACCUSED:

SIVAN, S/O. CHATHAN,
CONVICT NO.9302, CENTRAL PRISON, KANNUR.

BY ADV. M.R.JAYA PRASAD (STATE BRIEF)

RESPONDENT:

STATE OF KERALA.

BY PUBLIC PROSECUTOR SRI.K.C.SANTHOSH KUMAR

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD
ON 30/01/2007, THE COURT ON THE SAME DAY DELIVERED THE
FOLLOWING:

J.B.KOSHY & T.R.RAMACHANDRAN NAIR, JJ.

Crl.A.No.147 OF 2004

Dated 30th January, 2007

JUDGMENT

Koshy, J.

Appellant/accused was convicted and sentenced to undergo imprisonment for life and to pay a fine of Rs.5,000/= for offence punishable under section 302 of the Indian Penal Code. He was also sentenced to undergo rigorous imprisonment for two years under section 201 of the Indian Penal Code. Appeal was filed from that judgment and since he was unable to appoint an advocate of his choice, court appointed a legal aid counsel at state expense. Allegation against him was that he killed one Sosi, an unmarried man aged 45 years, as he was suspected to have illicit relationship with wife of the accused. It is the case of the prosecution that on 2.6.98 night the accused purchased and supplied liquor to the victim from the house of PW2 and subsequently they both together left that place. At 11 p.m. in the night, in the Sholayur-Chavadiyur Panchayath road, the accused inflicted fatal injuries on the head and other parts of Sosi by using stones and intentionally caused his death. After committing murder, the accused dragged the dead body of Sosi at a distance of one kilometre and partially buried the dead body in a pit in the bushy area of the property of one Muthu-Mudaliyar (not examined). The accused also set fire to the blood stained

clothes of the deceased so as to destroy the evidence and thus the accused caused disappearance of evidence.

2. There is no eye witness in this case and prosecution relied on circumstantial evidence. It is settled principle of law that the circumstances relied upon by the prosecution must be fully established, and the chain of evidence furnished by those circumstances should be fully complete so as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused. In a case of circumstantial evidence not only various links of evidence should clearly establish guilt of the accused, but also it must be such as to rule out a reasonable likelihood of the innocence of the accused. The Apex Court in Sharad v. State of Maharashtra (AIR 1984 SC 1622) described five principles for convicting an accused on the basis of circumstantial evidence which are as follows:

- 1) the circumstances from which the conclusion of guilt is to be drawn should be fully established, as distinguished from 'may be' established.
- 2) the facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty;

- 3) the circumstances should be of a conclusive nature;
- 4) they should exclude every possible hypothesis except the one to be proved; and
- 5) there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused.

It is well settled principle that unlike direct evidence, indirect circumstances which throw light, should lead from suspicion to certitude and care must be taken to avoid subjective pitfalls of exaggerating a conjecture into a conviction. Trial Court relied on four circumstances:

- (1) Motive;
- (2) Last seen together;
- (3) Recovery of material objects at the instance of the accused; and
- (4) Statement of the accused before the doctor.

Since conviction is based on circumstantial evidence, we are considering the evidence adduced by the witnesses to find out whether the above circumstances were proved and proved circumstances would lead only to the hypothesis that accused is guilty and nobody else.

3. PW11 gave the First Information Statement. On 3.6.98 morning, blood was found in the panchayath road by PW11, he, PW1 and others on further search saw the dead body in the pit. The dead body was found buried partially in the pit with the head downwards. On the basis of the information (Ext.P9) furnished by PW11, F.I.R was registered and thereafter on 5.6.98 report was filed making accusation against the accused. PW5 Assistant Professor of Forensic Medicine, Medical College, Thrissur conducted autopsy and issued Ext.P4 postmortem certificate. The ante-mortem injuries noted are as follows:

"B.Injuries (Ante-Mortem)

1. Abraded contusion 10 x 6cm x muscle deep over the front of forehead and right temple.
2. Lacerated wound 3.5 x 1 cm x muscle deep, vertical over the left side of front of head; its front end 6 cm above eyebrow and 4cm outer to midline.
3. Two skin deep superficial lacerated wounds 2 x 0.6 and 2.4 x 0.5 cm placed over the left side of head obliquely and separated by a distance of 1cm and 6.7cm above the tragus of ear in the 110' clock position.
4. Superficial lacerated wound 1.2 x 0.4cm over the left side of forehead 1.2cm outer to injury number (3).
5. Lacerated wound 4.5 x 2.2cm horizontal bone deep over the left eyebrow and

parallel to it with fracture of supercilliary ridge.

6. Lacerated wound 5 x 0.7 x bone deep over the right malar eminence with bruising 6 x 4 x 1cm around.
7. Fracture fragmentation of nasal bones.
8. Lacerated wound 1.5 x 0.8 x bone deep over the right malar eminence with bruising 6 x 4 x 1cm around.
9. Lacerated wound 3 x 2.7 x 0.5cm over the mucosal aspect of upper lip corresponding to left lateral incisor and canine and the latter was missing with its socket filled with clotted blood.
- 10 Lacerated wound 7 x 3 x 0.1cm involving the whole lower lip. The mandible was found fractured in between the central incisors of both sides vertically.
11. Lacerated wound 4.5 x 2cm horizontal over the under surface of chin with fracture fragmentation of mandible. Beneath injury numbers (1) to (8) frontal bone and anterior cranial fossa were fractured and fragmented. The dura was intact. The brain showed thick film of subarachnoid bleeding and the brain showed signs of raised intracranial tension as flattening of gyri and obliteration of sulci.
12. Fracture fragmentation of manubrium sterni, fracture of sternum at the level of II costal cartilage (horizontal and fracture of I to IX ribs close to sternal attachments. Chest cavity did not contain any fluid blood. The pericardial sac was lacerated and the pericardial cavity contained 100 ml of fluid blood. No injury to heart."

Postmortem certificate shows that stomach contained altered blood mixed with unidentifiable material with a spirituous smell. Apart from that, there was no evidence in the postmortem report that the deceased had consumed alcohol immediately before the death.

4. PW1 stated that he and PW11 while going through Sholayur-Chavadiyur Panchayat road, found out blood stains and on searching, the dead body was found at a distance of half a kilometre away from the panchayat road. MO1 belt, MO2 series chappals and MO3 stone were also found from the scene of occurrence. According to PW1, accused has once told him that the deceased had illicit relationship with his wife. This is the motive attributed to the accused for committing the murder. There is no other evidence to support the motive. Alleged motive is not proved and even if it is proved, mere existence of motive is not enough for convicting a person. At the most it may be one of the links in the chain of circumstantial evidence. He also deposed that an empty brandy bottle, a cigarette packet, two chappals (MO2) and a green belt (MO1) were seen in the place of occurrence. A big stone (MO3) was there in the canal. In cross examination he stated that usually two persons are required for lifting MO3 stone. (

).

He also stated that he has not noted any special identification mark in the stone.

5. PW2 was selling illicit arrack. He deposed that the deceased and accused came together to his house for drinking arrack and have consumed liquor. They left together by 8.30 P.M. He further deposed that he was an accused in a crime for assaulting father of the accused and that enmity continues. The suggestion in the cross examination was that the accused gave information regarding the illicit liquor and, therefore, there was a raid in the house of PW2 and he was inimical towards the accused. In any event, at the maximum, evidence of PW2 will show that the accused and deceased came to his house for drinking arrack and left the place at 8.30 p.m. It is not stated by PW2 that they were talking in inimical terms. They came together and drank liquor and later left. It is submitted by the counsel for the accused that a person who is doing sale of illicit liquor is telling lies to help the police. In any event, admittedly he is inimical towards the accused. Even if he is believed, it is very difficult to state that on the basis that they were seen up to 8.30 p.m. alone conviction can be entered on the accused on the facts of the case. The exact time of death is not ascertained. The last seen theory came into play where the time gap

between the possibility of time when the accused and deceased were seen together alive and when the deceased is found dead is so small that possibility of any person other than the accused being the author of the crime became impossible. Here, such a possibility is not established. (See para 12 of State of U.P. v. Satish (2005 AIR SCW 905). The mere fact that the accused and the deceased were seen together prior to the occurrence does not by itself lead to the irresistible conclusion that the accused must have murdered the deceased as held by the Apex Court in Lakhanpal v. State of MP (AIR 1979 SC 1620). PW2 is also an attestor to Exts.P1 and P2 mahazars whereby the shirt of the accused and the ashes stated to have been obtained by burning the clothes of the deceased were seized. Even though he admitted signature in Exts.P1 and P2, he stated that he has not seen the shirt (MO6) or ashes(MO7) and he has not seen the recovery of the same by the accused. He was not declared hostile. Therefore, the unchallenged evidence of prosecution witnesses was that shirt was not recovered as per the Mahazar. He also stated that he has signed many papers when the R.D.O. visited the place as well as when he was taken to the police station. Apart from that, there is no authorship of concealment. Even though there was blood stains in the shirt, no human blood was detected from the dress recovered. Therefore,

recovery of MO6 and MO7 are not admissible under Section 27 of the Evidence Act.

6. According to PW3, MO1 belt belongs to the accused. But, he stated that he has not noticed any special identification marks on the belt. He also identified MO2 series chappals as that of the deceased. Merely because PW1 stated that he was informed earlier by the deceased (date and time not mentioned) that the accused suspected illicit relationship between his wife and deceased, it cannot be stated that the accused is guilty and accused alone is guilty because motive is proved. It is true that motive is an important factor when prosecution relied on circumstantial evidence. But, if motive is put forward as a major circumstance, it must be fully established like any other circumstantial evidence as held by the Apex Court in Ramgopal v. State of Maharashtra (AIR 1972 SC 656). If the above evidence is correct, at the maximum it can be said that there is motive. But, mere establishment of motive is not sufficient to connect a person to a crime. Proof of motive is not necessary to satisfy a conviction when court is satisfied about accused being assailant of victim as held by the Apex Court in Narayan Nathu Naik v State of Maharashtra (AIR 1971 SC 1656). Even in cases based on circumstantial evidence,

failure to prove motive by itself is not fatal to the prosecution when there are otherwise possible circumstances which conclusively establish the guilt. However, if motive is proved, that itself supply a chain of link, but, absence of the above is not a ground to reject the entire prosecution case as held by the Supreme Court in State of Gujarat v. Anirudhsing (AIR 1997 SC 2780). But, motive cannot by itself sustain a criminal charge although proof of motive may add credence to other evidence adduced in the case. As held by the Apex Court in State of MP v. Paltan Mallah ((2005) 3 SCC 169)motive by itself is not sufficient to prove the guilt. Here, alleged motive was not proved. We have already seen that recovery cannot be believed and the alleged recovery of M06 shirt or M07 series of ashes will not connect accused with the crime. Prosecution was also not able to prove that deceased was seen alive last with the accused within a proximal time by a credible witness.

7. The only other evidence relied on by the prosecution is Ext.P5 certificate issued by PW6 doctor after examining the accused when he was in police custody. When police produced the accused before PW6 doctor, it is recorded that the injury was caused due to the assault made by Sosy, the deceased at 11.p.m. On 6.2.1998. According to

prosecution, that evidence alone prove the case of the prosecution and accused cannot deny his presence at the time of incident and during the scuffle accused got injury due to assault by the deceased. But, the doctor was not able to see any injury on the accused. It is true that such statements though made in police custody to the doctor, even if incriminating, not being a confession, is not excluded by Section 26 of the Evidence Act (**K. Padayachi v. State of Tamil Nadu** (AIR 1972 SC 66)). But, it is very difficult to believe that he went voluntarily to the doctor to make such a statement, as he has not sustained any injuries. It is only an artificial evidence created by the prosecution for the purpose of the case. In Ext.P5, it is not stated that the alleged history and cause of injury were given by the accused himself or by the police who brought him to the doctor. Prosecution story as such becomes more difficult to believe because, MO3 alleged to be used to commit the crime is so big that according to prosecution witness itself, ordinarily it cannot be lifted by one person alone. Even though the doctor who conducted postmortem stated that death was caused either of all the injuries, it is not stated that in the ordinary course it would cause death. Nature of injuries also suggest a death after fight. Blood stains were found in Sholayar road. Dead body was found at a distance of half a kilometre.

There is no evidence of dragging of a dead body to all those distance that too by a single accused. All this creates doubts on the prosecution story. In any event, at the maximum prosecution was able to create a doubt that accused might have been taken part in this murder, but, there is no evidence to prove the guilt of the accused positively.

8. After considering the totality of oral and documentary evidence, we are of the view that the prosecution failed to prove conclusively that accused is guilty and accused alone is guilty and nobody else. In any event, appellant/accused is entitled to benefit of reasonable doubt. Hence, his conviction and sentence are set aside. The accused is acquitted. The appellant/accused should be set free forthwith if he is not required in any other case.

The appeal is allowed.

J. B. KOSHY
JUDGE

T. R. RAMACHANDRAN NAIR
JUDGE

tk